

HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al.,

Plaintiff,

v.

STATE OF WASHINGTON, et al.,

Defendants.

Civil No. C70-9213

Sub-Proceeding No. 01-01
(Culverts)

PLAINTIFF-INTERVENOR
TRIBES' ANSWERS AND
RESPONSES TO
WASHINGTON'S THIRD
DISCOVERY REQUESTS

TO: STATE OF WASHINGTON, Defendant

AND TO: FRONDA WOODS, Attorney of Record for Defendant

AND TO: STEVE E. DIETRICH, Attorney of Record for Defendant

AND TO: PHILIP M. FERESTER, Attorney of Record for Defendant

COME NOW, the Plaintiff-Intervenor Tribes, and answer and respond to Defendant State of Washington's Third discovery requests pursuant to Fed. R. Civ. P. 26, 29, 33 and 34, the corresponding Local Civil Rules for the United States District Court – Western District of Washington ("LCR"), and the proposed Scheduling Order for this subproceeding.

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RESPONSES TO WASHINGTON'S THIRD DISCOVERY
REQUESTS – PAGE 1

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1 as an admission that they accept the discovery request or that the response or objection thereto
 2 constitutes admissible evidence. Similarly, the fact that the Plaintiff-Intervenor Tribes have
 3 responded to all or part of a request is not intended to and shall not be construed to be a waiver
 4 by them of all or part of any objection to other requests. The Plaintiff-Intervenor Tribes'
 5 answers to any discovery requests herein do not constitute a waiver of their right to object to
 6 future additional or supplemental discovery requests regarding the same or similar matters.
 7

8 6. The following responses use the common understanding of the term "culvert"
 9 for all responses: That is, a structure designed to channel a watercourse under a roadway, and
 10 not a dam, a tide gate, a bridge, or similar non-culvert structure. Likewise, several discovery
 11 requests use the phrase "fish passage barrier" without defining it. We have interpreted this
 12 phrase to mean road culverts which present a barrier to fish passage. A broader interpretation
 13 would be objectionable as it would be unduly burdensome and would not be calculated to lead
 14 to the discovery of admissible evidence.
 15

17 INTERROGATORIES AND REQUESTS FOR PRODUCTION

18 INTERROGATORY NO. 70: Do you contend that the Stevens Treaties reserve a fish
 19 passage easement or servitude in the lands that the Tribes ceded in Article I of each of the
 20 Stevens Treaties?
 21

22 ANSWER: Objection. Interrogatory is vague and ambiguous. The term "fish
 23 passage easement or servitude" is not defined. Also, the scope of the easement or servitude
 24 that is the subject of this Interrogatory is unknown so that it cannot be answered without
 25 assumptions and speculation as to the State's meaning. In addition, the usual and
 26

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1 accustomed fishing grounds and stations of the Tribes are neither limited nor circumscribed
2 nor even meaningful in reference to the lands ceded by the Tribes in the Stevens Treaties.
3

4 Notwithstanding these objections, the Tribes contend that the Stevens Treaties secure
5 to them the “right of taking fish” which imposes a duty upon the State to refrain from
6 diminishing the number of fish that would otherwise return to or pass through the tribe’s
7 usual and accustomed fishing grounds and stations by, among other things, blocking fish
8 passage to the extent that such diminishment would impair the tribes’ ability to earn a
9 moderate living from the fishery. This could be characterized as a negative easement or
10 negative servitude.
11

12
13
14 INTERROGATORY NO. 71: Do you contend that the basis for the duty alleged in
15 ¶ 4.1 of your Request For Determination is that “State owned roads and highways” lie within
16 lands that the Tribes ceded to the United States in the Stevens Treaties?

17 ANSWER: No. As ¶ 4.1 of our Request For Determination clearly states, the basis
18 for the State’s duty described is that the Stevens Treaties secure to the tribes the “right of
19 taking fish”.
20

21
22 INTERROGATORY NO. 72: Do you contend that the State of Washington and the
23 Tribes are co-owners of the fish in the case area?

24 ANSWER: Objection. The term “co-owner” is not defined and can potentially
25 include any number of rights, duties, and obligations. Also, the Interrogatory is not clear
26
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1 resurveyed following project completion in order to track habitat and morphologic change.
2 These data on changes in bed elevation, gradient, substrate size, LWD load, pool frequency,
3 etc. will help determine the effectiveness of these restoration treatments over the short- and
4 long-term.
5

6 SQUAXIN ISLAND:

7 SKOKOMISH:

8 QUINAULT:

9 YAKAMA:
10
11

12 INTERROGATORY NO. 136: Please identify the source of the funds that the
13 Stillaguamish Tribe used to undertake the activities described in the second sentence of its
14 answer to Interrogatory No. 34, Washington's First Discovery Requests to Plaintiff-
15 Intervenor Tribes. ("The Stillaguamish tribe has replaced several blocking culverts on
16 private county and federal lands, fenced livestock out and planted several miles of riparian
17 habitat, placed wood in channel including 8 engineered log jams (ELJ's) in the mainstem
18 north fork, funded road enhancement and abandonment on private and federal land.")
19

20 ANSWER:
21
22

23 INTERROGATORY NO. 137: Please list the Tribes that have enacted a natural
24 resources code, a land use code, a zoning code, or some combination thereof.
25

26 ANSWER:

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1 NWIFC:

2 SKAGIT RIVER SYSTEM COOPERATIVE:

3 POINT NO POINT TREATY COUNCIL

4 LUMMI: Lummi Nation Code of Laws titles 10, 13, 15, 17, 18.

5
6 PUYALLUP: The Puyallup Tribe has enacted some codes that would be in this
7 category.

8
9 SWINOMISH: Yes

10 UPPER SKAGIT:

11 SUQUAMISH: N/A

12 STILLAGUAMISH:

13
14 NISQUALLY: Nisqually Tribe has enacted several codes that fit the description in
15 the request.

16 PORT GAMBLE S'KLALLAM: In June 2004, Port Gamble S'Klallam Tribe
17 Business Committee adopted an Environmental Protection Code (EPC), which outlines land
18 development and permitting procedures on the Tribe's reservation. The EPC does not
19 specifically mention culverts or the requirement that they pass fish freely. However, the EPC
20 states:
21

22 "Development in sensitive areas, such as streams, wetlands, marine
23 shorelines, steeply sloped land, flood plains, erosion hazard areas and wetlands, if
24
25
26

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1 allowed, shall have only a minimum level of impact upon the functioning of the
 2 natural systems.”

3
 4 This provision was deemed adequate, at the time, because the Tribe is not in the
 5 habitat of constructing road crossings over fish-bearing streams. The Tribe’s 1234-acre
 6 reservation is served by a Kitsap County-maintained road (Little Boston Rd.) that does cross
 7 several fish-bearing streams such as Middle, Little Boston, and Bars creeks. Both Middle
 8 and Little Boston Creek crossings are fish passage barriers, though the Tribe lacks sufficient
 9 funds to remedy these barriers and views this responsibility as belonging to the County. The
 10 Tribe has tried repeatedly to secure federal funds to replace the Middle Creek culvert but has
 11 not been successful.
 12

13 JAMESTOWN S’KLALLAM: The Jamestown S’Klallam Tribe has enacted a
 14 Fishing Ordinance, Title 6, and a Hunting Ordinance, Title 9.

15 LOWER ELWHA KLALLAM: The Lower Elwha Klallam Tribe has enacted two
 16 such codes: a flood-control levee protection code; and a ground-water protection code.
 17

18 SAUK-SUIATTLE: The Sauk-Suiattle Indian Tribe has enacted the following:
 19 “Sauk-Suiattle Fishing Ordinance” and “Sauk-Suiattle Hunting Ordinance.”
 20

21 NOOKSACK:

22 HOH:

23 MAKAH: The Makah Tribe does not have any codes denominated as such, but has
 24 codes related to the management of fishing and whaling, a health code and water quality
 25 standards.
 26

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2 INTERROGATORY NO. 142: If your answer to Interrogatory No. 141 is yes, please
3 describe how the repair of state-owned culverts that lie upstream of non-state-owned
4 blockages would enable the Tribes to earn a moderate living from the fishery.
5

6 ANSWER: Depending upon the characteristics of the non-state owned culvert, the
7 State may be required to fix or compel the owner to fix the downstream culvert.
8
9

10 INTERROGATORY NO. 143: If a specific culvert passes only fish of 6 inches or
11 larger, do you contend that this culvert would violate the State of Washington's obligations
12 under the Stevens Treaties, as you contend them to be?
13

14 ANSWER: Yes, to the extent that the standard described by this Interrogatory would
15 diminish the number of fish that would otherwise return to or pass through the tribe's usual
16 and accustomed fishing grounds and stations, to the extent that such diminishment would
17 impair the tribes' ability to earn a moderate living from the fishery, it would violate the State
18 of Washington's obligations under the Stevens Treaties.
19
20

21 INTERROGATORY NO. 144: When did you first become aware that some state-
22 owned culverts block fish passage?
23

24 ANSWER: Objection. This Interrogatory is not reasonably calculated to discover
25 relevant evidence. The subject matter of this Interrogatory has no relevance or bearing on
26 any aspect or element of this case. Also, it is impossible to determine when individual tribal

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1 members or employees may have become aware that state-owned culverts blocked fish
2 passage. Notwithstanding these objections, the Tribes first became aware of the magnitude
3 of this problem when the Washington State Department of Transportation published its Fish
4 Passage Program Final Report, dated June 1997.
5

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7
8 INTERROGATORY NO. 145: If you deny any Request For Admission in
9 Washington's Second Requests for Admission to Plaintiff-Intervenor Tribes, please explain
10 the basis for each denial.

11 ANSWER: N/A.
12

13
14 INTERROGATORY NO. 146: Please identify the person or persons who supplied
15 all or any part of the answers to any of Interrogatories 70 – 145. List the answer for which
16 each person is responsible for in whole or in part.

17 ANSWER:

18 NWIFC: NO. 112: Lyle Miyamura, Controller. NOS. 116 and 120: Wendy Bowman.
19

20 ALL OTHER RESPONSES: John Hollowed, Habitat Services Director

21 SKAGIT RIVER SYSTEM COOPERATIVE: Larry Wasserman: Interrogatory
22 Nos. 109, 122, 126. Steve Hinton: Interrogatory Nos 81, 84, 85, 87, 115, 118, 119, 122, 124,
23 126, 144, RFP Nos. 47. Michael Olis: Jeff Myers: 111, 114, 132, 134, RFP Nos. 133, 135.
24

25 POINT NO POINT TREATY COUNCIL: Steve Todd answered Interrogatories No.
26 81, 82, 83, 84, 109, 111, 115, 132, 133, 134, 135, and 144; and Request for Production No. 46
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1 ANSWERS AND RESPONSES dated this 27th day of May, 2005.

2 RAAS, JOHNSEN & STUEN, P.S.
3 OFFICE OF SPECIAL COUNSEL

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5
6 DANIEL A. RAAS, WSBA #4970
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Nisqually, Nooksack, Sauk-Suiattle, Skokomish,
Squaxin Island, Stillagaumish, and Upper Skagit
Tribes
Tribal Coordinating Counsel

10 MORISSET SCHLOSSER AYER et al.

13
14 MASON D. MORISSET, WSBA #273
Counsel for the Tulalip Tribe
Tribal Coordinating Counsel

17 VERIFICATION

18 The undersigned, as Tribal Coordinating Counsel, and attorney for Plaintiff Tribe,
19 Lummi Indian Nation, certifies to the best of his knowledge, information and belief, formed
20 after a reasonable inquiry that the responses and objections are: (1) consistent with the Federal
21 Rules of Civil Procedure and warranted by existing law or a good faith argument for the
22 extension, modification or reversal of existing law; (2) not interposed for any improper
23 purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of
24 litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the
25 case, the discovery already had in the case, the amount in controversy and the importance of
26 the issues at stake in the litigation.

22 DATED this 27th day of May, 2005.

23 KANJI & KATZEN, PLLC

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25
26 PHILLIP E. KATZEN, WSBA #7835

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TRIBES' THIRD INTERROGATORIES, REQUESTS FOR
PRODUCTION, AND REQUESTS FOR ADMISSIONS
PROPOUNDED TO DEFENDANT - PAGE 118

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